No. 11998

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MICHAEL J. FANNING, INDIVIDUALLY AND AS POSTMASTER OF THE CITY OF LOS ANGELES, CALIFORNIA,

Appellant,

vs.

AL WILLIAMS AND AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., A CORPORATION,

Appellees.

Appeal From the District Court of the United States for the Southern District of California, Central Division

---

APPELLANT'S OPENING BRIEF.

H. G. MORISON,
Assistant Attorney General,

JAMES M. CARTER,
United States Attorney,

CLYDE C. DOWNING,
Assistant United States Attorney, Chief of Civil Division,

BERNARD B. LAVEN,
Assistant United States Attorney,
600 Federal Building, Los Angeles 12,
Attorneys for Appellant.

Of Counsel:

EDWARD H. HICKEY,
Special Assistant to the Attorney General,

HOWARD C. WOOD,
Attorney, Department of Justice,

WILLIAM C. O'BRIEN,
Attorney, Post Office Department.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

STATUTES.

No. 11998

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MICHAEL J. FANNING, INDIVIDUALLY AND AS POSTMASTER OF THE CITY OF LOS ANGELES, CALIFORNIA,

Appellant,

vs.

AL WILLIAMS AND AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., A CORPORATION,

Appellees.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

Suit was filed in the United States District Court for the Southern District of California by the plaintiffs (appellees) against the defendant (appellant), the Postmaster at Los Angeles, to enjoin the enforcement of a Post Office fraud order theretofore issued against the plaintiffs.

The jurisdiction of the court below is based on Section 41(6), Title 28, United States Code. The amended complaint [Tr. p. 231]* in paragraph 1 alleges that the action arises under the Postal Laws of the United States, namely, the Postal Fraud Order Statutes U. S. C. A., Title 39,

---

*References to Transcript of Record in the previous appeal, being No. 11317, are designated herein as "Tr.," and the Record in the instant appeal, being No. 11998, are designated as "R."

Section 259, R. S., Section 3929; September 29, 1890, c. 908, Section 2, 26 Stat. 466, as amended. This suit was originally dismissed by the court below for failure to join the Postmaster General, the judgment being affirmed by this Court (No. 11,317), 158 F. 2d 95, but reversed by the United States Supreme Court (*Williams v. Fanning,* 332 U. S. 490).

Following this reversal, the plaintiffs moved for summary judgment, the District Court entered a final judgment, dated May 6, 1948, granting the plaintiffs' motion and rendering permanent the injunction against the defendant restraining enforcement of the fraud order [R. p. 41]. From such judgment the defendant has appealed [R. p. 44]. The District Court's opinion appears in the record at page 36. This Court has jurisdiction to review the judgment of the District Court under Section 128 of the Judicial Code, 28 U. S. C., Section 225.

Statement of the Case.

Plaintiffs for years have engaged in selling through the mails the so-called "Al Williams Reducing Plan," including certain tablets called "Foods That Take Hunger Away" and a preparation named "Special Body Massage Creme," represented as reducing excess fat without strict diet and without suffering the pangs of hunger and other discomfort. Plaintiffs advertise in newspapers and other publications circulated by mail throughout the United States, soliciting orders and remittances of money through the mails.

On May 25, 1945, the Postmaster General charged Al Williams, Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System,

and WILLLIAMS HEALTH SYSTEM, with conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises in violation of Sections 3929 and 4041 of the Revised Statutes, as amended (39 U. S. C. 259 and 732), the scheme being described as follows:

"Said party and concerns are obtaining and attempting to obtain various remittances of money through the mails from divers persons for tablets called 'Foods That Take Hunger Away' together with 'Al Williams (weight) Reducing Plan' and for a 'Special Body Massage Creme' upon pretenses, representations and promises contained in advertisements and in written and printed matter sent through the mails to the effect:

That obese persons will lose weight easily and safely through the use of the said plan regardless of the number of pounds they are overweight or of their age or failure to reduce by other methods;

That the said plan does not include a 'strict diet';

That said tablets contain foods which eliminate hunger, and that the taking of these tablets in connection with the said plan will prevent the users from becoming hungry;

That a few days' use of the said plan and tablets will result in the user's loss of his desire to overeat and cause him to 'feel full of pep and have more energy';

That said 'Special Body Massage Creme' will eliminate 'flabby flesh' caused by the loss of weight; and

That the said 'Creme' will 'beautify the contour of the throat, bust and upper arms, calves of legs and thighs';

That the said tablets act as a 'general tonic' and their use will enable persons who have attained a normal body weight 'to remain physically fit':

Whereas, in truth and fact, said preparations and plan will not and cannot accomplish the results aforesaid, but all of the said pretenses, representations and promises are false and fraudulent." [Tr. pp. 219-221.]

In accordance with established practice, proceedings were instituted by service upon the plaintiffs of a notice to show cause returnable on June 20, 1945, why a fraud order should not issue. The hearing was held as scheduled on June 20, 1945. Plaintiffs were represented by counsel who filed a written answer denying the aforesaid charges [Tr. p. 221]. The transcript of the proceedings covers 190 pages exclusive of exhibits. Plaintiffs presented their witness and cross-examined the Government's witnesses [Tr. pp. 91-179].

The Solicitor's "Memorandum for the Postmaster General Embodying a Finding of Fact and Recommending the Issuance of a Fraud Order" [Tr. pp. 225, 226; App. pp. 1-9].* which stands uncontroverted, describes the Al Williams "Reducing Plan" as follows:

"The plan sold by the respondents for reducing the weight of obese persons consists of a restricted diet and a box of tablets to be taken with said diet. Chemical analysis shows the tablets to contain kelp, small quantities of sodium and potassium oxides, iron, calcium oxide, and a trace of iodine. Microanalysis dis-

---

*References to the Appendix of this brief are designated "App." and said Appendix sets forth for the convenience of the Court true and correct copies of the Solicitor's Memorandum for the Postmaster General, the fraud order and the Postal fraud statutes.

closed the presence in the tablets of alfalfa, wheat flour and soybean flour and small amounts of rhubarb root, parsley, spinach, lettuce, beet leaf, celery seed, capsicum fruit, carrot, asparagus, and animal meat tissues, and traces of yeast, kelp, and ginger rhizome. The 'Special Body Massage Creme' advertised and sold by the respondents was shown by a chemical analysis to contain phenol, menthol, camphor, eucalyptus, and water."

* * * * * * * *

"the diet furnished by the respondents was a strict low-calorie diet supplying between 600 and 750 calories a day and that it would not be easy for an obese person, accustomed to eating more food, to follow such diet."

The plaintiffs' advertisements are quoted in the Solicitor's Memorandum [Tr. pp. 222-225: App. pp. 3-6] and represent:

Reducing Can Be Fun With Foods That Take Hunger Away Try This New Amazing Method! It's simple—easy to follow. No "Canary diets" or strenuous exercises.

Men! Women! Amazing New Way to Lose Weight with Foods That Take Hunger Away! Look younger! Feel Better! If you are overweight Send Now for proven plan that has helped thousands from coast to coast shrink 5 to 10 inches around the waist, bust, hips! Get rid of dizziness, shortness of breath, heart palpitation, head and back pains, blood pressure and other symtoms due to excess weight. Send today for Free information on my proven Reducing Plan with Foods That Take Hunger Away. No starvation diets. No thyroid or harmful drugs. Not

sold in stores. Write Now for Free Data, Al Williams Health System.

Reducing Can Be Fun With Foods That Take Hunger Away—New Amazing Method! Look Younger Feel Better.

No More "Canary-Bird" Diets or Back-Breaking Exercises to Achieve Your Dream of Romantic Loveliness!

Reducing Plan That Takes Hunger Away contains No Drugs, No Medicines, No Thyroid Materials—in Fact Nothing That Could Not Be Given to a Child With Safety.

Reducing Is Made Easy, in a Sensible Way. It is logical that if you cut down the amount of food usually taken, you are bound to reduce. But the problem arises that when you cut down on your food intake, you become hungry, have a craving for more food, and cannot diet without often injuring your health. It is impossible to go very long on a rigid diet. It Is Not Difficult to Stay With My Plan. It is amazing what you will be able to do when you Change your blood stream with Foods that bring you down to your normal weight. Not only will you look better, but you will Feel Better, more Animated and More Vigorous.

It is adaptable to men and women and children of all ages. Persons as young as 12 and as old as 80 have reported excellent results from any reducing method.

These foods, contain 17 different fruits, minerals and vegetables dehydrated into pleasant tasting tablets. I usually suggest taking of them before meals, and whenever you feel hungry during the day. You will find that after a few days you will not crave to

overeat, and you will feel full of pep and have more energy. If you diet without taking these food supplements, you become too hungry, tired and nervous to stay with a low calorie diet long enough to lose weight.

The Special Body Massage Creme which I have found so effective in reducing programs in my own establishments should be used. I have found this Creme very valuable to firm the skin as the fat melts away. When used it tends to tighten the skin so that those pounds you lose won't leave "sags" where extra pounds use to be. It is also beneficial when used as directed to beautify the contour of the throat, bust and upper arms, calves of legs, and thighs.

This Creme acts as an astringent to take up the flabby flesh. Please understand that the Creme itself does not cause you to lose weight. I don't know of any Creme which will do that. But I have found astringents very valuable to firm the skin as the fat melts away. When used with massage, it tends to tighten the skin so that those pounds you lose won't leave "Sags" where extra pounds used to be. This creme is pleasant to use, and is readily absorbed. After weight reduction is brought about, the Concentrated Foods may be taken occasionally as a general tonic to remain physically fit. I am enclosing an Order Blank. If you have a friend, or if you wish to order more food, return the Order Blank in the enclosed envelope.

The medical expert witness for the Post Office Department testified only to matters of scientific factual knowledge constituting the consensus of such knowledge accepted by all orthodox schools of medicine. As hereinafter shown, this evidence factually demonstrated that the so-called

"Plan" involved a stringent diet [a reduction of intake of calories of 2,900 to 3,400 per day, R. pp. 123, 124], that "Foods That Take Hunger Away" were of such minute caloric value as to be ineffective in eliminating the pangs of hunger [10 tablets per day of 2 calories each, Tr. pp. 122, 123], and that the "Special Body Massage Creme" was useless in eliminating flabbiness resulting from weight reduction [being 75% water, Tr. p. 93]. This evidence was further supported by chemical and microanalyses of plaintiffs' preparations, with which the medical expert was familiar [Tr. pp. 126, 127, 132, 133], and was based upon generally established dietary and physiological facts and the arithmetics of metabolism [Tr. p. 127]. It clearly showed the false and fraudulent nature of plaintiffs' advertising and was uncontroverted by any contradictory medical or scientific evidence.

Plaintiff Al Williams, a former professional athlete, was the sole witness for the plaintiffs at the Post Office hearing. He was not qualified by education or scientific knowledge to testify as an expert concerning the medical scientific facts relevant to the case and this was conceded by his own lawyer [Tr. p. 162]:

"He is not testifying as a medical expert."

Following the hearing and on December 10, 1945, the Postmaster General issued fraud order No. 29990 against Al Williams; Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System, and Williams Health System [Tr. pp. 257-258].

On January 7, 1946, the complaint was filed in the District Court, seeking an injunction restraining defendant,

Michael J. Fanning, the postmaster at the City of Los Angeles, from enforcing the fraud order [Tr. pp. 2-48]. The defendant then moved to dismiss on the ground that the Postmaster General was an indispensable party. Thereafter in *Williams v. Fanning,* 332 U. S. 490, the Supreme Court of the United States held that the Postmaster General was not an indispensable party to suits of this character. Whereupon plaintiffs moved for summary judgment and renewed their application for a permanent injunction against enforcement of the fraud order. The court below granted the motion and injunction [R. pp. 40-41]. Its memorandum opinion dated April 27, 1948, states [R. pp. 36-37]:

> "Repeated examinations of the entire record of the proceedings before the postmaster general confirms the contention of the plaintiff that the only evidence in such record to support the order is the opinion evidence of one Putnam, who identified himself as a doctor employed full time by the Food and Drug Administration, who practiced medicine at night and odd times.
>
> "Under the rule of *American School of Magnetic Healing v. McAnnulty,* 187 U. S. 94, and the numerous cases following it, among which are *Jarvis v. Shackelton,* 136 Fed. 2nd 116, *Pinkus v. Walker,* 21 Fed. Supp. 610, and *Pinkus v. Walker,* 71 Fed. Supp. 993, mere opinion evidence is not substantial evidence to support such an order.
>
> "The order of the postmaster general is not supported by any substantial evidence and was therefore beyond his lawful authority to issue and is void.
>
> "Judgment will be for the plaintiff, who will prepare the appropriate Findings, Judgment and Perma-

nent Injunction. The Injunction now in force will remain in effect until the permanent injunction is issued."

On May 6, 1948, the District Court made findings of fact and conclusions of law [R. pp. 37-39], the pertinent finding being:

(1) That fraud order No. 29990 referred to in the pleadings and issued by the Postmaster General on December 10, 1945, was so issued and based upon opinion evidence.

The conclusions of law state:

WHEREUPON the court concludes as a matter of law:

I.

That the Postmaster General had no authority to issue the said fraud order and that it is void and of no effect, and that plaintiffs are entitled to judgment.

II.

That said fraud order was issued by the Postmaster General without substantial evidence to support it.

The defendant appeals from the judgment below issuing a permanent injunction and granting plaintiffs' motion for summary judgment and here seeks the reversal of that judgment, the vacation of the injunction and the dismissal of the action.

In brief, the lower court holds that there must be substantial evidence to support the issuance of a fraud order, that expert medical evidence, of a scientific factual nature, supported by chemical and microanalyses and uncontroverted by any other medical evidence, is "mere opinion"

evidence which cannot be substantial and hence the fraud order must fall. These assumptions raise the following questions:

Questions Involved.

(1) Whether the fraud order issued by the Postmaster General was supported by substantial evidence, and whether the court below followed accepted standards of judicial review.

(2) Whether the Postmaster General may treat mail addressed to the advertiser as fraudulent on finding that a mail order treatment for the cure of obesity will not produce the results represented to the purchaser.

(3) Whether the Postmaster General is without authority under the postal fraud statutes with respect to obesity treatments.

Statutes Involved.

Postal Fraud Order Statutes.

Section 259, Title 39, U. S. Code (Section 3929, Rev. Stats.), so far as pertinent, provides (complete text in Appendix):

> "The Postmaster General may, upon evidence satisfactory to him * * * that any person or company is conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any office at which registered letters or any other letters or mail matter arrive directed to any such person or company * * * to return all such matter to the postmaster at the office at which it was originally mailed, with the word 'Fraudulent' plainly written or

stamped upon the outside thereof * * * and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe."

Similarly, Title 39 U. S. C. 732 (R. S. 4041) provides in part (complete text in Appendix):

"The Postmaster General may, upon evidence satisfactory to him that * * * any person or company is conducting any * * * scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order * * * and may provide by regulation for the return to the remitters of the sums named in such money orders."

Specification of Errors.

1. That the District Court erred in holding that the order of the Postmaster General is not supported by substantial evidence;
2. That the District Court erred in holding that the expert evidence of Dr. Putnam, a witness on behalf of the Post Office Department, is not such substantial evidence;
3. That said District Court erred in granting the motion of plaintiffs for summary judgment;
4. That the District Court erred in issuing a permanent injunction against the defendant;
5. That said District Court erred in rendering judgment for the plaintiffs.

Summary of Argument.

I.

A postal fraud order will not be set aside if supported by substantial evidence.

II.

The fraud order issued herein was based on scientific fact, not mere opinion, and therefore was supported by substantial evidence.

Plaintiffs do not deny use of the mails for the circulation of the advertisements and solicitations of money set forth *supra,* page 2, nor dispute that such advertisements and solicitations as set forth in the Solicitor's Memorandum [Tr. pp. 222-225] are correctly reproduced. The sole issue is whether the evidence adduced to show that such advertisements and solicitations are false and fraudulent is substantial, not merely an opinion.

That evidence is demonstrable scientific and medical fact supported by chemical and microanalyses and uncontradicted by any demonstrable scientific or medical fact introduced by the plaintiffs. Representations that obesity may be lost without "strict" or "canary bird" diets and without the pain or discomfort resulting from pangs of hunger by the use of tablets ("Foods That Take Hunger Away") only containing two calories apiece [Tr. p. 123], clearly present as obvious questions of fact as any that may ever confront the Post Office Department. See *Cable v. Walker,* 152 F. 2d 23, 80 App. D. C. 283, cert. den. 328 U. S. 860; *Neher v. Harwood,* 128 F. 2d 846, 853 (C. C. A. 9);

Elliott Works, Inc. v. Frisk, 58 F. 2d 820 (S. D. Iowa). The reduction of caloric consumption from 4,000 per day to 600-750, as called for by the Williams' reducing "Plan" [Tr. pp. 123-124], is bound to create hunger and discomfort and infinitesimal caloric additions in the form of tablets will not relieve that discomfort [Tr. pp. 126, 127]. So clearly are these conclusions of fact based on generally accepted concepts of physiology and metabolism as to remove all doubt that the Postmaster General in any way founded the fraud order in issue on expressions of "mere opinion." The reduction of obesity, the issue of caloric intake, the food value of plaintiffs' tablets established by chemical and microanalyses, the dangers of radical reduction in weight to general health are all matters of established fact constituting substantial evidence on which the Postmaster General could rely under the current authorities. For the lower court to label uncontroverted testimony on these facts as "opinion" prevents the Postal officials from prohibiting victimization of the public in the profitable field of weight reduction. The unfortunate precedent established by the court below should be reversed.

ARGUMENT.

POINT I.

A Postal Fraud Order Will Not Be Set Aside if Supported by Substantial Evidence.

In reviewing the record under the postal fraud order laws [App. pp. 10-11], the District Court was not called upon to make independent findings whether plaintiff was engaged in a fraudulent enterprise, but rather to determine whether the Postmaster General had evidence to sustain his fraud order. A finding of the Postmaster General will not be set aside by the courts "where it is fairly arrived at and has substantial evidence to support it, so that it cannot be said to be palpably wrong and therefore arbitrary." *Leach v. Carlile,* 258 U. S. 138, 140; *New v. Tribond Sales Corporation,* 19 F. 2d 671, 57 App. D. C. 197, cert. den. 275 U. S. 550. As said by the court in *Farley v. Heininger,* 105 F. 2d 79, 81 cert. den. 308 U. S. 587:

> "The conclusion of the Postmaster General is presumptively correct and 'will not be reviewed by the courts where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary.' "

Only when the head of the executive department has exceeded his authority under the statute, or when his action is palpably wrong, is his decision subject to review by the courts. *Public Clearing House v. Coyne,* 194 U. S. 497, 509; *National Conference on Legalizing Lotteries, Inc. v. Farley,* 96 F. 2d 861, cert. den. 305 U. S. 624; *New v. Tribond Sales Corp.,* 19 F. 2d 671, cert. den. 275 U. S. 550; *Plapao Laboratories, Inc. v. Farley,* 92 F. 2d 228, cert. den. 302 U. S. 732; *People's United States Bank v. Gilson,* 161 Fed. 286 (C. C. A. 8); *Branaman v. Har-*

ris, 189 Fed. 461 (C. C. W. D. Mo.); *Missouri Drug Co. v. Wyman,* 129 Fed. 623 (C. C. E. D. Mo.).

The court cannot substitute its judgment for that of the Postmaster General, even though exercising an independent judgment it might reach a different conclusion. *Enterprise Savings Association v. Zumstein,* 67 Fed. 1000 (C. C. A. 6); *Putnam v. Morgan,* 172 Fed. 450 (S. D. N. Y.). Unless there is no evidence whatever which reasonably supports the Postmaster General's conclusions, enforcement of the fraud order may not be enjoined. *National Conference on Legalizing Lotteries, Inc. v. Farley,* 96 F. 2d 861, 68 App. D. C. 319, cert. den. 305 U. S. 624.

Both in reviewing the Postmaster General's findings and in considering applications for preliminary injunctive orders, the courts have been guided by the consideration expressed by Judge Hutcheson in *Crane v. Nichols,* 1 F. 2d 33:

> "* * * the statute authorizing fraud orders was aimed at such a beneficient purpose that only in the extremest cases should courts interfere with their issuance."

See:

Branaman v. Harris, 189 Fed. 461, 471;

Hall v. Willcox, 225 Fed. 333;

Sanden v. Morgan, 225 Fed. 266, 269.

In denying an application for an injunction restraining enforcement of a fraud order in *Putnam v. Morgan,* 172 Fed. 450 (C. C. S. D. N. Y.),[1] Judge Learned Hand, after

---

[1]Cited with approval in *Farley v. Heininger,* 105 F. 2d 79, cert. den. 308 U. S. 587, and *Farley v. Simmons,* 99 F. 2d 343, cert. den. 305 U. S. 651, reh. den. 305 U. S. 676.

stating, "I am not at all sure that I should have found the complainant's business fraudulent, if it had come before me for an independent decision," said (p. 451):

> "The sole question is whether he has exceeded the functions which the statute gives him. If he has not, he has committed no tort which I may enjoin. I should have thought that it was enough for him to plead that the 'fraud order' was the result of his being 'satisfied' upon a bona fide inquiry that a fraud was being practiced. * * * His decision on the facts is final, if there be any evidence at all on which he may act."

Since there was a fair hearing, no mistake of law, and an order grounded on substantial evidence, the Postmaster General's determination should not have been annulled and no injunction should have issued against his subordinate, the Postmaster. *Leach v. Carlile,* 258 U. S. 138; *Farley v. Heininger,* 105 F. 2d 79, 70 App. D. C. 200, cert. den. 308 U. S. 587; *Pike v. Walker,* 121 F. 2d 37, 73 App. D. C. 289, cert. den. 314 U. S. 625, reh. den. 314 U. S. 710; *Eugene Cable v. Walker,* 152 F. 2d 23, 80 App. D. C. 283, cert. den. 328 U. S. 860; *Farley v. Simmons,* 99 F. 2d 343, 69 App. D. C. 110, cert. den. 305 U. S. 651; *Aycock v. O'Brien,* 28 F. 2d 817 (C. C. A. 9); *Wheeler v. Farley,* 7 Fed. Supp. 433 (S. D. Calif.), appeal dismissed 293 U. S. 526; *Elliott Works, Inc. v. Frisk,* 58 F. 2d 820 (S. D. Iowa); *Acret v. Harwood,* 41 Fed. Supp. 492 (S. D. Calif.).

POINT II.

The Fraud Order Issued Herein Was Based on Scientific Fact, Not Mere Opinion, and Therefore Was Supported by Substantial Evidence.

The crux of the ruling below is found in the following language [R. p. 37]:

> "Under the rule of *American School of Magnetic Healing v. McAnnulty,* 187 U. S. 94, and the numerous cases following it, among which are *Jarvis v. Shackelton,* 136 F. 2d 116, *Pinkus v. Walker,* 21 Fed. Supp. 610 and *Pinkus v. Walker,* 71 Fed. Supp. 993, mere opinion evidence is not substantial evidence to support such an order.
>
> "The order of the postmaster general is not supported by any substantial evidence and was therefore beyond his lawful authority to issue and is void."

This obeisance to a misapprehension of the rule of the *McAnnulty* case, decided in 1902, ignores the progress of science and the recognition that what may once have been the subject of difference in medical opinion, has now become the subject of scientifically established fact. If the view of the lower court be upheld, the Postmaster General will never be able to prevent victimization of the public through mail order schemes for the treatment of disease or the reduction of obesity, no matter how misrepresented. Medical evidence will need to be relied upon and, in the view of the lower court, this will never constitute "substantial evidence." Such a road-block to protection of the public welfare does not represent the view of this court nor

the weight of authority.[2] To the extent that the court below holds that medical misrepresentations are beyond reach of the postal fraud sections, it not only misapprehends the import of the *McAnnulty* case but completely ignores the later decision in *Leach v. Carlile,* 258 U. S. 138.

Ready comprehension of the error of the court below in denominating as "mere opinion" the substantial factual evidence upon which the Postmaster General acted is obtained by reference to plaintiffs' representations and the medical and scientific facts adduced at the Post Office hearing showing the falsity of such representations. Thus, plaintiffs represent through the mails that: (1) Strict diet is not required, *i. e.,* no "canary diet," no "starvation diet," no more "canary-bird diet" [Tr. p. 222]; (2) Obese persons will lose weight easily and safely regardless of age, the advertising failing to indicate that rapid weight reduction is harmful to health in certain instances [Tr. p. 222]; (3) the tablets "Foods That Take Hunger Away" prevent those using the Reducing Plan from becoming

---

[2]The Government could not protect against victimization and it would be open season for quacks, charlatans, and faddists dispensing expensive innocuous or dangerous drugs through the mails. The Postmaster General may rely on expert medical testimony that a product has no value. *J. E. Todd, Inc. v. Federal Trade Commission,* 145 F. 2d 858, 79 App. D. C. 288; *Justin Haynes v. Federal Trade Commission,* 105 F. 2d 988, 989 (C. C. A. 2); cert. den. 308 U. S. 616; *Charles of the Ritz Distributing Corp. v. Federal Trade Commission,* 143 F. 2d 676 (C. C. A. 2); *Associated Laboratories v. Federal Trade Commission,* 150 F. 2d 629 (C. C. A. 2—Kelp-A-Malt for underweight); *Dr. W. B. Caldwell v. Federal Trade Commission,* 111 F. 2d 889 (C. C. A. 7); *Aronberg v. Federal Trade Commission,* 132 F. 2d 165 (C. C. A. 7); *John J. Fulton Co. v. Federal Trade Commission,* 130 F. 2d 85 (C. C. A. 9), cert. den., 317 U. S. 679; *United States v. One Device,* 160 F. 2d 194, 198-9 (C. C. A. 10). See also *Research Laboratories, Inc. v. United States,* 167 F. 2d 410 (C. C. A. 9, 1948).

hungry and after a few days' use will cause the user to feel "full of pep and have more energy" [Tr. pp. 223, 224]; (4) if the Williams' Reducing "Plan" is followed, losses of 10 pounds in 3 days, 35 pounds in 30 days and 73 pounds in 6 months are not rare exceptions [Tr. p. 117]; (5) that the "Special Body Massage Creme" will eliminate "flabby flesh" caused by loss of weight and will beautify the contour of the user's throat, bust, and upper arms, calves of legs and thighs [Tr. pp. 224, 225].

The factual scientific and medical evidence adduced by the Post Office Department showed that: (1) the principal cause of overweight is eating more food than the activities of one's body demand [Tr. p. 107]; (2) the average obese person consumes 3,500 to 4,000 calories per day [Tr. p. 123]; (3) plaintiffs' "Plan" contemplates a reduction of daily intake to between 600 and 750 calories per day and thus is a strict diet [Tr. pp. 121, 122]; (4) this sharp reduction in diet and the loss of weight contemplated and advertised by the plaintiffs would endanger health in some instances, such as where the purchaser of the Plan had suffered from previous tuberculosis or was a diabetic [Tr. pp. 110, 119, 120, 121]; (5) while the general principles of reducing are the same, the details should vary with age, sex, occupation, previous and present diseases, physical examination and laboratory tests [Tr. p. 121]; (6) the "Foods That Take Hunger Away" would not prevent those following the "Plan" from suffering the pangs of hunger which are due to stomach contractions and such tablets containing only two calories apiece and weighing 7/10ths of a gram would not stop such contractions [Tr. pp. 126, 127, 128, 134, 152]; (7) the taking of these "Food" tablets would not give pep and energy [Tr. p. 128]; and (8) the "Special Body Massage Creme" would

not eliminate "flabby flesh" resulting from loss of weight nor "beautify" the user's contours [Tr. pp. 133, 134] consisting, as it does, of 75% water [Tr. p. 93].

No contradictory medical nor scientific evidence was introduced. Not only did plaintiffs' counsel concede the qualifications of the Postal Department witnesses [Tr. p. 106], but the evidence adduced represented the general consensus of modern medical knowledge [Tr. p. 135] and was based upon demonstrable chemical and microanalyses of plaintiffs' "Food" tablets and "Special Body Massage Creme" [Tr. pp. 126, 127, 132, 133, 134].

It is obvious from the foregoing that the plaintiffs represented, through use of the mails, a panacea for weight reduction irrespective of age, sex or condition of health, without starvation and consequent discomfort. This panacea, as described in plaintiffs' advertisements, was refuted by scientific medical evidence, the most important and pertinent parts of which expressed conclusions based on well-proven medical, pharmacological and physiological knowledge established upon scientific bases and accepted in all orthodox medical quarters.

Under such circumstances, this factual refutation of plaintiffs' claimed panacea for obesity falls within the rule of *Leach v. Carlile,* 258 U. S. 138 (1921), in which the Supreme Court stated:

> "* * * it is sufficient to say that the question really decided by the lower courts was, not that the substance which appellant was selling was entirely worthless as a medicine, as to which there was some conflict in the evidence, but that it was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpe-

trating a fraud upon the public. This was a question of fact which the statutes cited committed to the decision of the Postmaster General, and the applicable, settled rule of law is that the conclusion of a head of an executive department on such a question, when committed to him by law, will not be reviewed by the courts where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary."

Further, the authorities upon which the court below relied do not sustain its ruling. In the *McAnnulty* case the Supreme Court decided the case on a demurrer admitting the allegations of the Complaint—it reversed a judgment sustaining the demurrer and granted defendant leave to answer. The *McAnnulty* case involved a scheme for curing disease by mental suggestion at a time when knowledge of the underlying principles was largely undeveloped and there had been no crystallization of scientific opinion. *Farley v. Simmons, supra,* 99 F. 2d 343 at 347; *Missouri Drug Co. v. Wyman,* 129 Fed. 623, 627 (C. C. E. D. Mo.); *Appleby v. Cluss,* 160 Fed. 984, 986 (C. C. N. J.). The decision cannot be construed to deny that scientific advances have removed an infinite number of exaggerated claims from the realm of opinion. See *Leach v. Carlile,* 258 U. S. 138; *Farley v. Heininger,* 105 F. 2d 79, 84, 70 App. D. C. 200, cert. den., 308 U. S. 587; *Randle v. United States,* 113 F. 2d 945, 949, 72 App. D. C. 368, cert. den., 311 U. S. 683; *Aycock v. O'Brien,* 28 F. 2d 817 (C. C. A. 9); *United States v. 7 Jugs of Dr. Salsbury's Rakos,* 53 Fed. Supp. 746, 757-8 (D. Minn.); *cf. United States v. Olsen,* 161 F. 2d 669 (C. C. A. 9—Sprectrochrome libel).

Also, as recognized by this court in the recent case of *Research Laboratories, Inc. v. United States,* 167 F. 2d 410, 414, the court in the *McAnnulty* case conceded that the Postmaster General "might make a showing that fraud was being committed."

In the instant case the medical expert evidence presented by the Post Office Department was confined to scientifically established facts and, together with other evidence, constituted "a showing that fraud was being committed" by the plaintiffs.

The plaintiffs' representations and the factual refutation of their honesty, shown above, represents no "mere opinion." The nature of the physiological, dietary, nutritional and medical facts constituting the Post Office evidence represents the consensus of recognized medical knowledge. No stronger showing of fraud could possibly be made.

Further, as indicated in *Research Laboratories, Inc. v. United States,* 167 F. 2d 410, 414 (C. C. A. 9th, 1948), throughout the Supreme Court opinion in the *McAnnulty* decision "doubt was expressed as to the qualifications of a Postmaster General to pass on medical questions." This court, in distinguishing the *McAnnulty* case, then said:

> "In contrast to the meager technical facilities for the determination of medical questions possessed by the Postmaster General—at least at the time that the McAnnulty case was decided—we find that the Federal Security Agency has at its disposal almost unlimited professional resources with which to carry out its investigations in the enforcement of the Federal Food, Drug and Cosmetic Act of June 25, 1938."

Today, this ground of distinction is as applicable to Post Office proceedings against schemes for the treatment of disease or obesity as it is to proceedings instituted upon the request of the Federal Security Agency. For some time the Post Office Department has availed itself of the "unlimited professional resources" of the Food and Drug Administration, Federal Security Agency, and did so in the instant case. Casey, the chemical analyst, is employed by the Food and Drug Administration [Tr. p. 91] as is Eisenberg, the microanalyst [Tr. p. 94] and Dr. Lawrence Putnam, the medical expert [Tr. p. 103]. Hence, the Postmaster General is no longer limited to "meager technical facilities" and, hence, the rule of the *McAnnulty* decision should no longer apply.

Similarly, *Jarvis v. Shackelton Inhaler Co.,* 136 F. 2d 116 (C. C. A. 6th), does not support the ruling of the lower court. On the contrary the Sixth Circuit applied the correct principles. The court examined and weighed the record and found no substantial evidence to support the fraud order. The medical proof on which the Post Office Department relied was adduced on the basis of an incomplete analysis of the preparation in question and involved proof of *medical opinion* as distinguished from *medical fact*. The court also held that the Post Office Department failed to show that the promoter was making the claims that the Department charged he was making, in effect, that the Department's interpretation of the advertising literature could not be sustained. No comparable situation exists here. The representations in plaintiff's advertising are plain, and the hearing was devoted to a settled field of medical science.

In this case, complete analyses of the plaintiffs' tablets and "Massage Creme" were made and the medical evidence

was premised upon such analyses [Tr. pp. 91-95; 126, 127, 132, 133]. Nor do the *Pinkus v. Walker* decisions cited by the court below afford any comfort to the plaintiffs. In those cases, there was at least a purported divergence of medical evidence as to the efficacy of the plaintiffs' medicinal preparation to be used in weight reduction. Significantly, no contrary medical or other scientific evidence was brought forth at the Post Office hearing in this case. Such an omission may well be considered a confession of the accuracy of the scientific factual evidence presented by the Post Office Department. As was stated in *United States v. 50¾ Dozen Bottles, more or less, of Sulfa-Seb,* 54 Fed. Supp. 759:

> "The scientific testimony in a case of this character is the testimony that counts. Scientific testimony is available to support any meritorious cause. * * * Of course, scientific testimony is available to the Government in support of any meritorious cause presented by the Government. * * * *But private individuals are also able to obtain the testimony of outstanding men of science provided there is real merit in their cause.* * * *
>
> * * * * * * * *
>
> *"There was a reason for the complete failure of the claimants to support their contentions by outstanding expert testimony. That testimony just was not procurable.* The failure of the claimants in this *respect impressed us as almost the equivalent of a confession of the general accuracy of the testimony of the Government's experts."* (Italics ours.)

The weight of authority—including the decisions of this court—have appreciated that the *McAnnulty* decision was not intended to shackle the powers of the Postmaster Gen-

eral to afford consumer protection in every instance of misuse of the mails for medical schemes. It has been recognized that that decision cannot be construed as denying that scientific advances have removed from the realm of opinion an infinite number of exaggerated claims, the falsity of which are now demonstrable matters of fact.

This is succinctly stated in *United States v. 7 Jugs, etc., of Dr. Salsbury's Rakos,* 53 Fed. Supp. 747, 759 (D. Minn., 1944), wherein the court stated:

> "Facts established by recognized scientific investigation are deserving of high standing in respect to the falsity of claims of effectiveness. *Elliott Works v. Frisk,* D. C. Iowa 1932, 58 F. 2d 820, 824, 825; *cf. United States v. Lesser,* 2 Cir., 1933, 66 F. 2d 612, 616. Moreover, it must be obvious that tremendous advancements in scientific knowledge and certainty have been made since the rule in the *McAnnulty* case was first announced. Questions which previously were subjects only of opinion have now been answered with certainty by the application of scientifically known facts. In the consideration of the *McAnnulty* rule, courts should give recognition to this advancement."

And in *Elliott Works, Inc. v. Frisk,* 58 F. 2d 820 (S. D. Iowa, 1932), cited with approval by this court in the *Research Laboratories, Inc.* case, *supra,* the court, in sustaining the validity of a postal fraud order, held the rule of the *McAnnulty* decision inapplicable, saying (p. 825):

> "The facts here are entirely different from what they are in that case, which arose on a demurrer wherein all the material facts averred in the bill were admitted for the purpose of the hearing. It may be conceded that the court there held that mere matters of opinion on which witnesses might vary in their con-

clusions would not substantiate a fraud order such as is here under consideration; but the finding of the solicitor in this case is not based on opinions, but upon a scientific investigation, findings, and tests made by the United States Bureau of Standards. Opinions of experts when founded upon known scientific facts are not to be considered the same as opinions of laymen, but are considered by the courts as substantive evidence."

In this case, the testimony of Dr. Putnam, Post Office medical expert, was no matter of mere opinion. Scientific investigation and tests of "Foods That Take Hunger Away" and the "Special Body Massage Creme" had been made by accredited representatives of the Food and Drug Administration. Important parts of Putnam's testimony were based upon the scientific facts established as the result of these tests and, hence, such testimony in the words of the *Frisk* decision "are considered by the courts as substantive evidence."

In *Cable v. Walker,* 152 F. 2d 23 (App. D. C.), the court states:

> "After serving the appellants with notice of the specific charges against them, the Postmaster General went forward with hearings at which considerable testimony was given by expert government witnesses to the effect that appellants preparation was incapable of producing the results claimed. *This testimony was directed toward an analysis of the chemical contents of the product, and a review of the professional opinion on the matter of treatment of pyorrhea.* * * * We consider the evidence upon which the Postmaster General predicated the fraud order to be 'substantial in the strongest meaning of the word.'" (Italics ours.)

Similarly, this court, in *Fulton v. Federal Trade Commission,* 130 F. 2d 85, cert. den. 317 U. S. 679, in reviewing an order to desist from advertising a product as an effective cure for diabetes, stated:

> "The findings have support in the testimony of expert witnesses called by the Commission. But the petitioner argues that since none of the experts had prescribed Uvursin or observed its effects in concrete cases their testimony was incompetent and inadmissible. We think otherwise. The witnesses were shown to possess wide knowledge in the field under inquiry. There is no good reason to suppose them incompetent to express an opinion as to the lack of therapeutic value of petitioner's preparation merely because they had had no personal experience with it in the treatment of the disease. Their general medical and pharmacological knowledge qualified them to testify."

See also *Hall v. United States,* 267 Fed. 795, 798 (C. C. A. 5); *United States v. Chichester Chemical Co.,* 298 Fed. 829, 832 (App. D. C.); *Haynes v. Federal Trade Commission,* 105 F. 2d 988, 989 (C. C. A. 2); *Neff v. Federal Trade Commission,* 117 F. 2d 495 (C. C. A. 4); *Alberty v. Federal Trade Commission,* 1941, 118 F. 2d 669 (C. C. A. 9), cert. den. 314 U. S. 630; *United States v. One Device,* 160 F. 2d 194, 199 (C. C. A. 10); *Charles of the Ritz Distributors Corp. v. Federal Trade Commission,* 143 F. 2d 676, 678; *Goodwin v. United States,* 2 F. 2d 200, 201 (C. C. A. 6); *Dr. W. B. Caldwell, Inc. v. Federal Trade Commission,* 111 F. 2d 889, 891 (C. C. A. 7).

Nor can it be said that the lower court's ruling should be sustained because founded upon distrust of the factual medical knowledge of Dr. Putnam, the medical expert. While the memorandum opinion below refers to him as "one Putnam, who identified himself as a doctor employed full time by the Food and Drug Administration, who practiced medicine at night and odd times," this should not be construed as indicating that the court was either dissatisfied with his qualifications or was passing upon the weight of his testimony as a basis for holding that his evidence was "mere opinion" and "not substantial evidence." In *Haynes v. Federal Trade Commission,* 105 F. 2d 988 (C. C. A. 2), the court referred to the fact that the medical witnesses before the Commission were well qualified expert witnesses who "based their opinions upon their general medical and pharmacological knowledge." The Circuit Court upheld the right of the Commission to accept the testimony of these witnesses as "substantial evidence to support the Commission's findings" stating further:

> "That this court is not permitted to pass upon the weight of the evidence is too well established to require the citation of authorities."

Further, Dr. Putnam's qualifications, as recited in the record [Tr. pp. 103-106], show beyond question the wide extent of his medical knowledge on the issues presented here.

In brief outline, he received his M. D. degree at Harvard University Medical School in 1934. After interning in several hospitals in Boston, Massachusetts, he was on ac-

tive medical duty with the United States Army assigned to the Civilian Conservation Corps. From 1939 until January, 1941, he was medical officer for the Veteran's Administration, Washington, D. C. Since January, 1941, he has been employed by the Food and Drug Administration (Federal Security Agency). He is licensed to practice medicine in Maine, Massachusetts and the District of Columbia, where he was practicing at the time of the hearing, seeing patients by appointment so as not to conflict with his duties as an officer of the Food and Drug Administration. His specialty is internal medicine, which includes the study and treatment of obesity [Tr. p. 107]. He is a clinical instructor in medicine at George Washington University School of Medicine, Washington, D. C., as well as Associate Visiting Physician at Gallinger Hospital [Tr. p. 104]. At the time of the hearing he was an Associate of the American College of Physicians, a national organization which admits only those whose education, training and demonstrated ability as doctors conform to the highest standards of the profession.

Counsel for plaintiffs at the Post Office Department hearing conceded on the record the qualifications of Dr. Putnam as an expert witness [Tr. p. 106]. He was accepted as a qualified expert witness by the Trial Examiner and also by the Postmaster General.

Conclusion.

Casual perusal of current newspapers and periodicals impresses the reader with the plethora of advertisements offering panaceas for obesity. Williams is just another of the many advertisers who promise what every obese person hopefully seeks—an easy, comfortable, effortless, hungerless way to lose weight rapidly and pleasantly. The medical fact and truth is, as shown by the evidence, that reduction of food intake below energy requirements is the only way to reduce and hunger, both painful and discouraging, will necessarily be present. Nor will tablets of two calories each, weighing less than one gram, even when swallowed with 100 calorie glasses of fruit juice, assuage the hunger of an appetite which demands 4,000 calories instead of the 750 which this "Plan," at best, prescribes.

Incidental to the fraud was Williams' pretense that the 2 calorie alfalfa tablets would give hunger relief when he must have known that such brief relief as might be experienced from their use would be derived from the sugary fruit juices or the fatty soups taken therewith.

The court below misapprehended the scope of the Postmaster General's authority under Title 39 U. S. C. 259 and 732 and construed them so narrowly as to deny him any power to purge the mails of fraudulent obesity reduction schemes. The court below also misapprehended both the character of the evidence and the rule of the *McAnnulty* decision and in so doing failed to follow *Leach v. Carlile,* 258 U. S. 138, and numerous other ruling cases, including decisions of this Court.

The judgment below and the injunction issued were erroneous. The judgment should be reversed, the action dismissed, and the injunction vacated.

Respectfully submitted,

H. G. Morison,
Assistant Attorney General,

James M. Carter,
United States Attorney,

Clyde C. Downing,
Assistant United States Attorney,
Chief of Civil Division,

Bernard B. Laven,
Assistant United States Attorney,
Attorneys for Appellant.

Of Counsel:

Edward H. Hickey,
Special Assistant to the Attorney General,

Howard C. Wood,
Attorney, Department of Justice,

William C. O'Brien,
Attorney, Post Office Department.

APPENDIX.

[Copy]

POST OFFICE DEPARTMENT
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C., December 6, 1945.
F. & L. Docket 14/381

IN THE MATTER OF CHARGES THAT AL WILLIAMS, AL WILLIAMS, HEALTH CONDITIONER, AL WILLIAMS, PHYSICAL CONDITIONER, AL WILLIAMS HEALTH SYSTEM, THE AL WILLIAMS HEALTH SYSTEM, AND WILLIAMS HEALTH SYSTEM, AT LOS ANGELES, CALIFORNIA, ARE ENGAGED IN CONDUCTING A SCHEME FOR OBTAINING MONEY THROUGH THE MAILS BY MEANS OF FALSE AND FRAUDULENT PRETENSES, REPRESENTATIONS AND PROMISES, IN VIOLATION OF 39 U. S. CODE 259 AND 732 (SECTIONS 3929 AND 4041 OF THE REVISED STATUTES, AS AMENDED).

MEMORANDUM FOR THE POSTMASTER GENERAL EMBODYING A FINDING OF FACT AND RECOMMENDING THE ISSUANCE OF A FRAUD ORDER.

A hearing was held before this office in the above entitled case on June 20, 1945. The transcript of the proceedings is hereby made a part hereof. Proceedings were instituted by the service on respondents of a notice to show cause why a fraud order should not be issued against the names set forth in the caption hereof, stating the time and place of hearing, together with the specification of charges which as amended reads as follows [R. 2-9]:

It is charged that the above named party and concerns are engaged in conducting a scheme for obtain-

ing money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), which said scheme is in substance and effect as follows:

Said party and concerns are obtaining and attempting to obtain various remittances of money through the mails from divers persons for tablets called "Foods That Take Hunger Away" together with "Al Williams (weight) Reducing Plan" and for a "Special Body Massage Creme" upon pretenses, representations and promises contained in advertisements and in written and printed matter sent through the mails to the effect;

That obese persons will lose weight easily and safely through use of the said plan regardless of the number of pounds they are overweight or of their age or failure to reduce by other methods;

That the said plan does not include a "strict diet";

That said tablets contain foods which eliminate hunger, and that the taking of these tablets in connection with the said plan will prevent the users from becoming hungry;

That a few days' use of the said plan and tablets will result in the user's loss of his desire to overeat and cause him to "feel full of pep and have more energy";

That said "Special Body Massage Creme" will eliminate "flabby flesh" caused by the loss of weight; and

That the said "Creme" will "beautify the contour of the throat, bust and upper arms, calves of legs and thighs";

That the said tablets act as a "general tonic" and their use will enable persons who have attained a normal body weight "to remain physically fit";

Whereas, in truth and in fact, said preparations and plan will not and cannot accomplish the results aforesaid, but all of the said pretenses, representations and promises are false and fraudulent.

The respondents were represented by counsel at the hearing and the respondent Al Williams appeared in person. A written answer was filed by the respondents, in which the aforesaid charges are denied. Subsequent to the hearing, a copy of the transcript was furnished to the respondents and a brief and supplemental brief were filed by them.

On the basis of the entire record I find the following to be the facts in this case:

All of the names listed in the caption hereof are used by the respondents in conducting their business through the mails from Los Angeles, California.

The reducing "plan" sold through the mails by the respondents is advertised in periodicals of national circulation and by written and printed matter sent through the mails. The following are excerpts taken from the printed circulars of the respondents:

Reducing Can Be Fun With Foods That Take Hunger Away. Try This New Amazing Method! It's simple—easy to follow. No "Canary diets" or strenuous exercises. [Gov. Ex. 1-A.]

Men! Women! Amazing New Way to Lose Weight with Foods That Take Hunger Away! Look younger! Feel Better! If you are overweight Send Now for proven plan that has helped thousands from coast to coast shrink 5 to 10 inches around the waist, bust, hips! Get rid of dizziness, shortness of breath, heart palpitation, head and back pains, blood pressure and other symptoms due to excess weight. Send today for Free information on my proven Reducing Plan with Foods That Take Hunger Away. No starvation diets. No thyroid or harmful drugs. Not sold in stores. Write Now for Free Data, Al Williams Health System. [Gov. Ex. 1-B.]

Reducing Can Be Fun With Foods That Take Hunger Away—New Amazing Method! Look Younger Feel Better.

No More "Canary-Bird" Diets or Back-Breaking Exercises to Achieve Your Dream of Romantic Loveliness! [Gov. Ex. 1-D.]

Reducing Plan That Takes Hunger Away contains No Drugs, No Medicines, No Thyroid Materials—in Fact Nothing That Could Not Be Given to a Child With Safety. [Gov. Ex. 2-C-3.]

Reducing Is Made Easy, in a Sensible Way. It is logical that if you cut down the amount of food usually taken, you are bound to reduce. But the problem arises that when you cut down on your food intake, you become hungry, have a craving for more food, and cannot diet without often injuring your health. It is impossible to go very long on a rigid diet. It Is Not Difficult to Stay With My Plan. It is amazing what you will be able to do when you

Change your blood stream with Foods that bring you down to your normal weight. Not only will you look better, but you will Feel Better, more Animated and More Vigorous. [Gov. Ex. 2-C.]

It is adaptable to men and women and children of all ages. Persons as young as 12 and as old as 80 have reported excellent results from my reducing method. [Gov. Ex. 2-C-3.]

These foods, contain 17 different fruits, minerals and vegetables dehydrated into pleasant tasting tablets. I usually suggest taking of them before meals, and whenever you feel hungry during the day. You will find that after a few days you will not crave to overeat, and you will feel full of pep and have more energy. If you diet without taking these food supplements, you become too hungry, tired and nervous to stay with a low calorie diet long enough to lose weight. [Gov. Ex. 2-C-3.]

It is possible that you have tried before to get rid of unwanted fat. Perhaps you have enthusiastically embarked on some kind of "diet" suggested to you by a well-meaning friend. Perhaps you have tried bending and squatting and stooping, or you may have bought gadgets or rollers or other contrivances guaranteed to make the fat "melt away like magic." [Gov. Ex. 2-C-1.]

The Special Body Massage Creme which I have found so effective in reducing programs in my own establishments should be used. I have found this Creme very valuable to firm the skin as the fat melts away. When used it tends to tighten the skin so that those pounds you lose won't leave "sags" where extra

pounds used to be. It is also beneficial when used as directed to beautify the contour of the throat, bust and upper arms, calves of legs, and thighs. [Gov. Ex. 2-C.]

This Creme acts as an astringent to take up the flabby flesh. Please understand that the Creme itself does not cause you to lose weight. I don't know of any Creme which will do that. But I have found astringents very valuable to firm the skin as the fat melts away. When used with massage, it tends to tighten the skin so that those pounds you lose won't leave "Sags" where extra pounds used to be. This Creme is pleasant to use, and is readily absorbed. [Gov. Ex. 2-C-3.]

Time passes quickly. If you are really serious and follow the suggestions given, you should be amply paid in securing the results desired. If you have only had one order of the Concentrated Foods, please bear in mind that it may require several more packages to secure the results desired. I suggest that you continue the plan, so now that you have started you will not lose the benefits already attained.

After weight reduction is brought about, the Concentrated Foods may be taken occasionally as a general tonic to remain physically fit. I am enclosing an Order Blank. If you have a friend, or if you wish to order more food, return the Order Blank in the enclosed envelope. [Gov. Ex. 4-F.]

The plan sold by the respondents for reducing the weight of obese persons consists of a restricted diet and a box of tablets to be taken with said diet. Chemical analysis shows the tablets to contain kelp, small quantities of sodium and

potassium oxides, iron, calcium oxide, and a trace of iodine. Mecroanalysis disclosed the presence in the tablets of alfalfa, wheat flour and soybean flour and small amounts of rhubarb root, parsley, spinach, lettuce, beet leaf, celery seed, capsicum fruit, carrot, asparagus, and animal meat tissues, and traces of yeast, kelp, and ginger rhizome. The "Special Body Massage Creme" advertised and sold by the respondents was shown by a chemical analysis to contain phenol, menthol, camphor, eucalyptus, and water. [Tr. 46, 47, 50, 52; Gov. Ex. 4.]

There appeared on behalf of the Government an expert medical witness fully qualified by education and experience to give testimony concerning the medical issues involved in this case. [Tr. 59-64.] This witness gave extensive testimony concerning the condition of obesity and its causes, and the proper scientific treatment thereof. [Tr. 64-75.] He testified that the diet furnished by the respondents was a strict low-calorie diet supplying between 600 and 750 calories a day [Tr. 81, 84] and that it would not be easy for an obese person, accustomed to eating more food, to follow such diet. [Tr. 80-92.] His testimony shows also that it would not be safe for persons with certain diseases and conditions and at certain ages to reduce as rapidly as might be done by following the diet of the respondents. [Tr. 78-89.]

The medical expert testified that the tablets furnished by the respondents, the ingredients of which he knew from the chemical analysis and the microanalysis, would be of no value in the treatment of obesity; and that any weight reduction accomplished by following the "plan" of the respondents would result solely from the low-calorie diet. [Tr. 87-92.] He stated that said tablets would not elimi-

nate or relieve the hunger experienced by an obese person while following the low-calorie diet prescribed by the respondents. [Tr. 86-92.] By the respondents' directions the user is limited to ten tablets daily. [Gov. Ex. 4-D-1.] The tablets weigh less than a gram each and supply about two calories each. [Tr. 83-87.] The average obese person consumes from 3500 to 4000 calories daily. [Tr. 83.] The expert testimony shows that the tablets will not furnish energy or "pep", are not a "general tonic", and will not keep one "physically fit." [Tr. 88.]

The evidence shows that after one loses a considerable amount of weight his skin becomes flabby, and this flabbiness will remain in mature people but may disappear to some extent in young people. The medical expert knew the ingredients of the "Special Body Massage Creme" sold by the respondents, from the chemical anlysis thereof. He testified positively that massage with said creme would have no effect whatever, regardless of how long used, upon the flabby condition resulting from reduction in weight, or upon the contour of the throat, bust and upper arms, calves of legs and thighs. [Tr. 93-95.]

The respondents offered no expert medical testimony. The respondent Al Williams testified in his own behalf but was not permitted to give testimony concerning the efficacy of his "plan" in reducing obesity because he was not qualified to give expert medical testimony.

Subsequent to the hearing in this case, and after a copy of the transcript of the hearing had been furnished to the respondents, notice was received by this office from the respondents that another attorney had been substituted in the case for the attorney who had represented them at the hearing. This notice of substitution was signed by both

of said attorneys. Thereafter there was received from the respondents a motion to reopen the case for the reception of additional testimony to be taken by depositions at Los Angeles, California. This motion was denied. There was also received later a motion by the respondents that "all possible scientific tests be made and obtained by the Post Office Department" to determine the efficacy of the tablets sold by the respondents for the elimination or prevention of hunger when used in connection with the reducing plan. This motion was likewise denied.

Full consideration has been given to the original and supplemental briefs filed by the respondents, and to the legal authorities cited therein. The contentions made therein are without merit when considered in the light of the evidence in this case showing the falsity of the representations made through the mails by the respondents.

The evidence in this case clearly shows and I so find that the respondents operating under the names set forth in the caption hereof, are conducting a fraudulent enterprise through the mails as charged.

I, therefore, recommend that a fraud order be issued against all of the names set forth in the caption of the memorandum of charges, at Los Angeles, California.

(Signed) VINCENT M. MILES
Solicitor.

[Copy]

Order No. 29990
(Case No. 44237-F)

POST OFFICE DEPARTMENT

WASHINGTON, December 10, 1945.

To the Postmaster,
Los Angeles, California.

It having been made to appear to the Postmaster General, upon evidence satisfactory to him that Al Williams; Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System, and Williams Health System, and their officers and agents as such, at Los Angeles, California, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of sections 259 and 732 of title 39, United States Code, said evidence being more fully described in the memorandum of the Solicitor for the Post Office Department of the date of December 6, 1945, and by authority vested in the Postmaster General by said laws the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said party & concerns and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department.

And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said party & concerns to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped upon the outside of such letters or matter. Where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed to send such letters and matter to the appropriate dead letter branch with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

(Signed) J. M. Donaldson
Acting Postmaster General.

Postal Fraud Order Laws

Title 39, U. S. Code 259 provides:

"The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or com-

pany, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by mail to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself." (39 U. S. Code 259.)

Title 39, U. S. Code 732 provides:

"The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or prop-

erty of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders.

"This shall not authorize any person to open any letter not addressed to himself.

"The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money orders to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way." (39 U. S. Code 732.)